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In the Supreme Court of the United States

ROCKY DIETZ, PETITIONER

v.

HILLARY BOULDIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 794 F.3d 1093.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2015. The petition for a writ of certiorari was filed on October 9, 2015, and granted on January 19, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

This case presents a simple but important question: whether a federal court has the authority to recall discharged jurors for the purpose of re-empaneling them, further instructing them, and ordering them to deliberate anew in order to reach a different verdict.

After an automobile accident that left petitioner with significant injuries, petitioner brought suit against respondent in Montana state court, and the case was removed to the United States District Court for the District of Montana. Although respondent admitted responsibility for the accident and accepted liability for petitioner's medical expenses to date, the jury returned a verdict awarding petitioner $0 in damages.

The judge told the jury it was discharged, and all of the jurors left the courtroom. Some of the jurors engaged in conversation with the court clerk, and at least one left the courthouse altogether. After recessing, the judge determined that the verdict was not supported by the evidence. The judge recalled the jurors, set aside their verdict, and instructed them that they should deliberate anew and return an award for at least $10,136, the amount of petitioner's medical expenses to date. The reassembled jury returned a verdict awarding petitioner only $15,000 in damages.

The district court denied petitioner's motion for a mistrial, Pet. App. 37a, and the court of appeals affirmed, *id.* at 1a-17a. The court of appeals held that a judge may recall discharged jurors for further service in the same case even after the judge has told the jury it was discharged and the jurors have left the judge's presence and control. See *id.* at 10a-13a. Because that holding was incorrect, the judgment of the court of appeals should be reversed, and the case remanded for a new trial.

1. Petitioner is a former pipefitter residing in North Dakota. On August 9, 2009, petitioner was visiting his mother in Bozeman, Montana. After washing his mother's car at Duds 'n' Suds, petitioner decided to go to the gas station to fill up the car before he left town the next day. On the way, petitioner stopped at a red light on Babcock Street at the intersection with 19th Avenue. When the light turned green, petitioner proceeded on Babcock Street through the intersection. At the same time, respondent, a Montana resident, ran the red light on 19th Avenue and collided with the passenger side of petitioner's vehicle. J.A. 13; Pet. App. 2a; Pet. C.A. Br. 6, 9-10; Resp. C.A. Br. 1.

The collision left petitioner with injuries to his lower back, resulting in severe back pain as well as radiating pain in his leg and hip. Petitioner required physical therapy, steroid injections, and prescription and non-prescription medications to address his injury. J.A. 16; Pet. App. 2a; Pet. C.A. Br. 6, 9-10; Resp. C.A. Br. 1.

2. On January 26, 2011, petitioner brought suit against respondent in Montana state court, asserting a claim of negligence. Citing diversity of citizenship, respondent removed the case to the United States District Court for the District of Montana. J.A. 6.

The case proceeded to trial before a jury. With the parties' consent, a magistrate judge presided over the trial. Respondent admitted that he was at fault for the accident and that petitioner was injured as a result. Respondent also stipulated that petitioner's past medical expenses, in the amount of $10,136, were reasonable, necessary, and caused by the collision. Pet. App. 2a; Pet. C.A. Br. 9, 11; Resp. C.A. Br. 4, 17.

The trial took place over two days. As a result of respondent's stipulations, the only disputed issue at trial was the amount of any *additional* damages that re-

spondent owed petitioner, including future medical expenses. Petitioner presented evidence that he would continue to need regular physical therapy, injections, and medications to alleviate the pain he was experiencing. Respondent argued that only some of petitioner's future medical expenses were related to the collision and that petitioner would not actually undertake all of the treatment he identified. Respondent further suggested that the jury should award petitioner an amount "somewhere between ten and $20,000" to account for the stipulated past medical expenses and for additional damages. Pet. App. 2a; Pet. C.A. Br. 10-11; Resp. C.A. Br. 17-19.

During deliberations, the jury sent the judge a note asking: "Has the $10,136 medical expenses been paid; and if so, by whom?" J.A. 36; Pet. App. 2a-3a. The note caused the judge to question whether the jury understood that "their verdict may not be less than that amount," and the judge recognized that a verdict in less than the stipulated amount of damages would be invalid. J.A. 36; Pet. App. 3a. Despite that concern, the judge responded to the note simply by informing the jury that the information it sought was not germane to the verdict. J.A. 37; Pet. App. 3a.

The jury returned a verdict in favor of petitioner (as the verdict form required it to do) but awarded him $0 in damages. Pet. App. 3a, 22a, 24a. The judge promptly thanked the jury for its service and ordered it "discharged," telling the jurors they were "free to go." *Id.* at 25a. The jurors then left the courtroom. *Ibid.*

After the jurors left, petitioner's counsel indicated his intention to make a post-trial motion. Pet. App. 25a. The judge told counsel that he "[would] have plenty of time for post-trial motions" and that he "d[id]n't have to make them right now." *Ibid.* The judge then recessed proceedings. *Ibid.*

3. After recessing, the judge realized that the verdict awarding petitioner $0 in damages was not "legally possible" in light of the stipulated amount of damages. Pet. App. 26a; see Br. in Opp. 3 (conceding that the verdict was invalid). The judge ordered court personnel to stop the jurors and bring them back. Pet. App. 26a, 31a.

Having summoned counsel to chambers, the judge acknowledged the problem with the verdict and suggested two alternatives: (1) filing a motion for new trial, with the result that a new trial would be "mandatory," or (2) re-empaneling the jurors, instructing them to reach a different verdict, and ordering them to deliberate anew. Pet. App. 26a, 28a. Petitioner's counsel strenuously objected to re-empaneling the discharged jurors. *Id.* at 26a-29a. To avoid a new trial, however, the judge decided to "send the jury back into deliberations" to reach a different verdict. *Id.* at 28a. The judge explained that he would "hate to just throw away the money and time that's been expended in this trial." *Ibid.*

Between the time of their discharge and recall by the judge, all of the jurors left the courtroom and were permitted to mingle with non-jurors under no instructions or restrictions from the judge. Pet. App. 25a. Some of the jurors were seen speaking with the court clerk. *Id.* at 26a-27a. Of the seven jurors, two "went down" the hall or stairs from the courtroom. *Id.* at 31a. According to the clerk, at least one of the jurors "left the building to go get his hotel receipt" and bring it back. *Id.* at 28a; see *id.* at 31a (statement by one of the jurors that the juror had gone downstairs, without indicating whether the juror had then proceeded to leave the building).

Upon the jurors' return to the courtroom, the judge asked the jurors as a group whether they "talked to anybody about the case outside [their] immediate numbers," to which they collectively answered no. Pet. App. 31a.

The judge did not question each juror individually or ask what each juror did after the discharge. *Ibid.* The judge then informed the jurors that he was re-empaneling them and would ask the jury to "start over with clarifying instructions." *Ibid.*

The judge instructed the jury that its verdict was "not possible" as a matter of law on the facts of this case. Pet. App. 30a. The judge explained that "it was admitted from the beginning in this case[] that the medical bills of $10,136.75 were caused by this collision," and the verdict "could not fly in the face of that undisputed evidence." *Ibid.* The judge further instructed the jury that its verdict must be "$10,136.75 plus some other and additional reasonable amount as compensation for the injury." *Ibid.*

In response to those instructions, a juror raised his hand and told the judge that, "[h]ad you said that upon sending us into the room, you would have had a different answer." Pet. App. 32a. The juror added that the jury had sought "clarification" on that very point in its note during deliberations but had received no guidance. *Ibid.* The judge disputed the clarity of the jury's note but ultimately "accept[ed] the blame" for "not making this more clear" before the jury delivered its verdict. *Ibid.*

The judge ordered the jurors to return the next morning to deliberate anew. Pet. App. 33a. Petitioner's counsel renewed his objection to recalling the jurors after discharge and moved for a mistrial. *Id.* at 35a. The judge denied the motion. *Id.* at 37a.

The reassembled jury returned a verdict awarding petitioner only $15,000 in damages. Pet. App. 38a, 40a. The district court entered judgment in favor of petitioner in that amount. *Id.* at 21a.

4. Petitioner appealed, contending that the recall of the discharged jurors was impermissible. The court of

appeals affirmed. Pet. App. 1a-17a. It held that a judge may recall jurors for further service in a case after discharging them as long as the judge "make[s] an appropriate inquiry to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." *Id.* at 12a.

At the outset, the court of appeals acknowledged that a jury "[t]ypically * * * is no longer an entity after the court discharges it," and the "protective shield" imposed by the judge during trial, "which prevents jurors from being subjected to prejudicial outside influences, is removed upon dismissal." Pet. App. 6a (internal quotation marks and citation omitted). But the court nevertheless concluded that discharged jurors may be recalled for further service, even if they had the opportunity to mingle and discuss the case with non-jurors during their discharge, as long as the jurors did not encounter prejudicial influences of such magnitude as to prevent them from fairly reconsidering their verdict. See *id.* at 12a.

In so concluding, the court of appeals rejected the "bright-line rule" adopted by the Eighth Circuit "prohibiting recall once the jurors have left the confines of the courtroom" after being discharged. Pet. App. 9a (citing *Wagner* v. *Jones*, 758 F.3d 1030, 1035 (8th Cir. 2014), cert. denied, 135 S. Ct. 1529 (2015)). The court of appeals acknowledged that "there are some advantages to the Eighth Circuit's rule": in particular, it "offers better guidance than an amorphous rule," "is more straightforward to apply," and "better protects against improper external influence." *Id.* at 10a, 11a (internal quotation marks and citation omitted). Yet the court of appeals declined to adopt that rule on the ground that, while the "potential for prejudicial influence" exists as soon as jurors have been discharged, particularly "in an age of instant electronic communication," that potential may not

be realized between the time of discharge and recall in a given case. *Id.* at 11a.

In the court of appeals' view, allowing a judge to recall discharged jurors if the judge determined that the jurors were not exposed to outside influences after discharge "strikes a sensible balance between considerations of fairness and economy and allows for a cost-effective alternative to an expensive new trial." Pet. App. 11a. The court instructed that, in deciding whether to recall discharged jurors, a judge should consider "the totality of circumstances" in order to "determine whether recalling the jury would result in prejudice to the [parties] or undermine the confidence of the court—or of the public—in the verdict." *Id.* at 13a (internal quotation marks and citation omitted; alteration in original).

Applying that rule to this case, the court of appeals concluded that recalling the discharged jurors to receive additional instructions, deliberate anew, and reach a different verdict was permissible in this case. Pet. App. 16a-17a. While noting that "an individualized examination [of each juror] would be preferable," the court reasoned that the judge's collective questioning had revealed "no evidence the jury had been tainted by improper influence" during its dismissal. *Id.* at 15a, 16a. The court added that "[the fact] [t]hat the jurors were recalled to deliberate anew upon a substantive matter rather than simply to correct a technical error does not change our conclusion." *Id.* at 16a.[1]

Judge Bea concurred in the judgment. Pet. App. 18a-20a. He agreed that discharged jurors could be recalled

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[1] The court of appeals rejected other arguments for reversal in an unpublished opinion. See J.A. 39-40. Petitioner does not renew any of those arguments in this Court.

absent evidence of undue prejudice, but he disagreed that a judge was affirmatively obligated to inquire into prejudice *sua sponte*. See *id.* at 18a.

SUMMARY OF ARGUMENT

The discharge of the jury is a pivotal moment in a case. For the jurors, discharge marks the point at which their service as jurors, with its special authority as well as restrictions, is at an end and they return to being ordinary members of the public. For the litigants, discharge marks the point at which certain rights, such as the right to poll the jury, become unavailable and certain time periods, such as the time to move for acquittal, begin to run. And for the district court, discharge marks the point at which the court's authority over the case constricts in significant ways. Simply put, discharge marks the moment when the district court loses the authority to recall the jurors for further service in the case and when the interests in fairness and finality become paramount.

The court of appeals erred in this case when it permitted a federal judge to recall discharged jurors for the purpose of re-empaneling them, further instructing them, and ordering them to deliberate anew to reach a different verdict. Its judgment should be reversed.

I. A federal court lacks the authority to recall discharged jurors for further service in the same case.

A. Nothing in the federal rules of procedure gives a district court the authority to recall jurors after discharge for further service in a case. In fact, the rules implicitly prohibit district courts from recalling discharged jurors for any type of further service, much less for the purpose of further instructing them and ordering them to deliberate anew to reach a different verdict.

Of particular relevance here, Federal Rule of Civil Procedure 51(b)(3) provides that a district court "may instruct the jury at any time before the jury is discharged." The plain language of the rule withholds authority to instruct jurors after discharge, upon recalling them for further service; the authority to reinstruct the jury and require continued deliberations to correct an invalid verdict expires at the point at which the jury is discharged. Once the jury has been discharged, Civil Rule 59 provides that a new trial is the only remedy for an invalid verdict. Other federal rules, both civil and criminal, similarly presuppose that discharge deprives the district court of authority over the jury and the jury of authority over the case.

B. A district court lacks authority over jurors after discharge for the additional, fundamental reason that jurors return to being ordinary citizens upon discharge. When they are selected for jury service, jurors receive the unique authority to consider the evidence and render a verdict in the case. Upon discharge, the jurors lose that authority over the case and can no longer alter their verdict. Jury service also comes with unique restrictions imposed by the court—on everything from where and when jurors must report for service to what they may discuss during the trial. After discharge, those restrictions fall away and jurors may read, speak, and think freely about the case like any other citizen.

As ordinary citizens, jurors are no longer subject to the authority of the district court outside of the ways in which the court may exercise authority over any other citizen, such as by subpoena or notice of contempt. Those mechanisms are available to a district court for obtaining evidence from jurors about their verdict, but the court does not possess the authority to reconstitute

the former jurors *as a jury* to deliberate anew in the same case.

C. A district court also lacks inherent authority to recall discharged jurors, because such a power fails all three requirements this Court has established to identify the inherent powers of federal courts. *First*, permitting recall for the purpose of further service in a case would circumvent or conflict with a variety of civil and criminal rules. Most notably in this case, permitting recall would contravene the explicit limitation of Civil Rule 51(b)(3). *Second*, there is no long unquestioned history of courts recalling discharged jurors for further service. Quite to the contrary, the evidence from English common law before the Founding and from American practice thereafter demonstrates that courts did not exercise such authority. *Third*, the power to recall discharged jurors is in no way necessary to the exercise of a federal court's other powers. Without the authority to recall discharged jurors, courts would still be able to exercise their core powers to adjudicate cases and enforce judgments, because existing rules already provide ample procedures for remedying an invalid or ambiguous verdict after the jurors have been discharged.

II. The court of appeals ignored the absence of authority to recall discharged jurors and instead fashioned a rule based on its own policy balancing between the interests of fairness and economy. Even if this Court were to employ that mode of analysis, however, the interests in fairness and finality strongly counsel in favor of a bright-line rule against recall—especially in circumstances such as these, where the district court recalled discharged jurors for the purpose of further instructing them and ordering them to deliberate anew and reach a different verdict.

A. In both civil and criminal cases, the recall of discharged jurors implicates the fundamental guarantee of a fair trial in a fair tribunal. After discharge, jurors are free to encounter outside influences, and given the immediacy of modern technology, it is highly likely that they will. Even aside from outside influences, jurors may simply change their minds after discharge, and recall itself presents serious potential for confusion and unintended compulsion. Those dangers are most acute in a situation such as this one, where discharged jurors are recalled for further instruction and deliberation. A bright-line rule forbidding recall in such circumstances protects the fundamental right to a fair trial and preserves public confidence in the fairness of jury verdicts.

B. The recall of discharged jurors for further instruction and deliberation also obviously undermines the finality of jury verdicts. The possibility of recall at some later date to correct an invalid verdict as long as jurors have not encountered unduly prejudicial influences would subject jurors and litigants to indefinite uncertainty. Such adverse consequences are avoided by a bright-line rule against recall.

C. Expediency, the virtue touted by the court of appeals here, does not outweigh the significant fairness and finality interests at stake in recalling discharged jurors for reinstruction and further deliberation. To the contrary, the federal rules of procedure create incentives for parties to identify and correct certain types of errors before the jury is discharged, promoting efficiency. But as to other types of errors—such as the error at issue here, a verdict contrary to the weight of the evidence—the rules create no such obligation, thereby affording the losing party the right to a new trial even if some other remedy would be more efficient. A rule permitting recall of discharged jurors for further instruction and delibera-

tion would fly in the face of the balance already struck by the federal rules. Because a federal court has neither express nor inherent authority to recall discharged jurors for further service, the judgment of the court of appeals should be reversed.

ARGUMENT

I. A FEDERAL COURT LACKS THE AUTHORITY TO RECALL DISCHARGED JURORS FOR FURTHER SERVICE IN A CASE

A federal district court does not have the authority to recall jurors after discharge for further service in a case. The federal rules of procedure put certain procedures and remedies beyond the district court's power upon the point of discharge. Specifically, after discharge, a district court has no authority to re-empanel jurors for further proceedings, much less to instruct them further with respect to the case or to order them to engage in further deliberations. Indeed, re-empaneling jurors after discharge would directly conflict with a host of relevant rules.

Nor is there any basis for concluding that a district court somehow has inherent authority to recall jurors after discharge. Historical practice does not support any such claim, and jury recall is not necessary to the exercise of the judicial power, because the federal rules already provide ample procedures for remedying errors that take place before discharge. Because nothing in the federal rules or any other source of judicial authority authorizes district courts to recall discharged jurors for further service in the same case, the court of appeals erred by holding that recall was permissible, and its judgment should be reversed.

A. The Federal Rules Of Procedure Do Not Permit A District Court To Recall Discharged Jurors

The federal rules of procedure, which are "as binding as any statute duly enacted by Congress," time and again reflect the pivotal importance of jury discharge in the conduct of a case. *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988). The rules give a district court wide latitude in reaching and correcting a verdict while the jury remains empaneled during a jury trial (and throughout a bench trial). But both the civil and criminal rules constrict a district court's authority in numerous respects upon discharge. After that point, certain procedures and remedies provided by the rules are no longer available to the court.

Of particular relevance here, the Federal Rules of Civil Procedure establish that, when a jury renders an invalid verdict but has not yet been discharged, the court may clarify its instructions and direct the jury to deliberate and reach a different verdict. See Fed. R. Civ. P. 51(b)(3); *Unit Drilling Co.* v. *Enron Oil & Gas Co.*, 108 F.3d 1186, 1191 (10th Cir. 1997). Once the jury has been discharged, the rules provide a different remedy for an invalid jury verdict: a new trial. See Fed. R. Civ. P. 59; *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251 (1940). Nothing in the federal rules (or in any source of positive federal law) gives a district court the authority to recall jurors after discharge for further service in a case—much less for the purpose of further instructing them and ordering them to deliberate anew in order to reach a different verdict. To the contrary, the rules necessarily imply that a district court is *prohibited* from recalling discharged jurors.

1. In this particular case, the rule of most direct application is Federal Rule of Civil Procedure 51(b)(3). That rule provides that a district court presiding over a

jury trial "may instruct the jury at any time *before the jury is discharged*" (emphasis added). Under the plain language of the rule, even after the jury has begun its deliberations, the court may give additional instructions to aid the jury in reaching a verdict. And if the jury returns an invalid or ambiguous verdict, the district court has the authority to reject the verdict, instruct the jury further, and order the jury to resume its deliberations (or, in the alternative, to declare a mistrial). See *Unit Drilling*, 108 F.3d at 1191; cf. *Clark* v. *Sidway*, 142 U.S. 682, 686 (1892) (upholding a jury verdict where the jury initially left the amount of damages blank on the verdict form).

By contrast, nothing in Civil Rule 51(b)(3) or any other rule authorizes a district court to instruct the jury *after* discharge; Rule 51(b)(3) conspicuously withholds that authority. The undeniable implication is that a district court lacks the authority to instruct a jury after discharge. *A fortiori*, a district court lacks the authority to recall jurors after their discharge for the purpose of further instructing them and ordering them to deliberate anew in order to reach a different verdict—as took place in this case.[2]

2. Other federal rules presuppose that discharge deprives a district court of authority over the jury and the jury of authority over the case. For example, Civil

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[2] While this is a civil case, the corresponding criminal rule is to the same effect. Federal Rule of Criminal Procedure 30(c) provides that a district court "may instruct the jury before or after the arguments are completed, or at both times." See also Fed. R. Crim. P. 30 advisory committee's note (1987) (making clear that "arguments" refers to closing arguments of counsel). Nothing in that rule or any other rule authorizes a district court to instruct the jury after discharge in a criminal case.

Rule 59 governs motions for a new trial. In the case of a bench trial, Rule 59 authorizes a court acting on a new-trial motion to grant the movant's request for a new trial *or* effectively to continue the first trial by "tak[ing] additional testimony, amend[ing] findings of fact and conclusions of law or mak[ing] new ones, and direct[ing] the entry of a new judgment." Fed. R. Civ. P 59(a)(1)(B), (a)(2). In the case of a jury trial, however, Rule 59 authorizes a court acting on a new-trial motion to provide only one form of relief: a new trial. See Fed. R. Civ. P 59(a)(1)(A). Rule 59 withholds from a district court the authority to reopen and resume a jury trial after discharge for the purpose of entering a new judgment. To state the obvious, recalling jurors from the initial trial and ordering them to deliberate anew and reach a different verdict is not the same thing as a new trial—and granting that remedy is therefore contrary to the rule.

In a similar vein, Civil Rule 50(b) gives a district court three options for responding to a motion for judgment as a matter of law that has been renewed after a jury trial. In response to a motion filed within 28 days after entry of judgment—or if the motion addresses an issue concerning the jury not decided by the verdict, within 28 days "after the jury was discharged"—the court may "(1) allow judgment on the verdict, if the jury returned a verdict; (2) order a new trial; or (3) direct the entry of judgment as a matter of law." Fed. R. Civ. P. 50(b). Like Rule 59, however, Rule 50(b) does not authorize recalling jurors after their discharge for the purpose of ordering them to deliberate further—much less to deliberate anew in order to reach a different verdict.

In criminal cases, motions for a new trial are governed by Federal Rule of Criminal Procedure 33, which has the same structure as Civil Rule 59. In the case of a bench trial, Criminal Rule 33 authorizes a court acting on

a new-trial motion to grant the movant's request for a new trial *or* effectively to continue the first trial by "tak[ing] additional testimony and enter[ing] a new judgment." Fed. R. Crim. P. 33(a). In the case of a jury trial, however, Rule 33 authorizes the court to provide only one form of relief: a new trial. *Ibid.* As with Civil Rule 59, Criminal Rule 33 expressly confers the authority to continue a bench trial after its completion, but conspicuously does not confer any such authority to continue a jury trial after discharge.

3. Still other federal rules further illustrate the manner in which jury discharge circumscribes a court's authority. Crucially, under both the civil and criminal rules, the district court's authority to poll the jury, whether in response to a party's request or *sua sponte*, terminates when "the jury is discharged." Fed. R. Civ. P 48(c); Fed. R. Crim. P. 31(d). Upon discharge, therefore, the court has no authority to recall jurors for the purpose of conducting a poll. Those rules reflect the principle that a jury retains its ability to alter its verdict as long as the case remains before it; as one court of appeals has put it, polling "gives effect to each juror's right to change his mind about a verdict to which he has agreed in the jury room." *Audette* v. *Isaksen Fishing Corp.*, 789 F.2d 956, 958 (1st Cir. 1986) (internal quotation marks and citation omitted). Once the jury has been discharged, however, its power over the case ends, and polling would be inappropriate.

Finally with regard to the rules, Criminal Rule 29(c) provides that the date of discharge triggers the 14-day time period during which a defendant may move for a judgment of acquittal. This Court has held that a district court lacks the authority to grant an untimely motion for acquittal or otherwise to circumvent the rule's time limit. See *Carlisle* v. *United States*, 517 U.S. 416, 433 (1996).

Bizarrely, however, if a district court were to have the power to recall jurors after discharge, it could render timely an otherwise untimely motion for acquittal through the simple artifice of recalling jurors and then once again discharging them, thereby resetting the clock on the motion. And if a court lacks the authority to recall discharged jurors for the relatively minor task of restarting a time period for filing, a court surely lacks the authority to recall discharged jurors for the much greater task of deliberating anew and reaching a different verdict.

In sum, nothing in the federal rules authorizes a district court to recall jurors after discharge for further service in a case—much less for the purpose of further instructing them and ordering them to deliberate anew in order to reach a different verdict. To the contrary, the exercise of such authority by a district court would be contrary to every relevant rule governing the conduct of a case after a jury's verdict.

B. Upon Discharge, A Juror Returns To Being An Ordinary Citizen

The absence of authority for a district court to recall discharged jurors for further service in a case is consistent with the fundamental principle that discharge marks a juror's return to being an ordinary citizen. Upon discharge, a juror ceases to be a juror. A former juror has no power to issue or modify the verdict in a case, because the power over the case resides not in the individual but in the office of juror. And after discharge, the court possesses only such authority over a former juror as it may lawfully exercise over any other ordinary citizen.

1. As this Court has recognized, "[t]he jury is an essential instrumentality—an appendage—of the court."

Turner v. *Louisiana*, 379 U.S. 466, 472 (1965) (internal quotation marks and citation omitted). Upon their selection to serve on a jury, jurors collectively receive the authority to consider the evidence and render the verdict in the case. Jurors exercise that power according to the instructions of the judge and under their oath to decide the case "upon the law and the evidence" alone. United States Courts, *Handbook for Trial Jurors Serving in the United States District Courts* 8 (2012) (Juror Handbook) <tinyurl.com/trialjurors> After discharge, jurors are relieved of their authority over the case and return to being ordinary citizens. At that point, as then-Chief Judge Cardozo famously put it, the jury "has ceased to be a jury, and, if its members happen to come together again, they are there as individuals, and no longer as an organized group, an arm or agency of the law." *Porret* v. *City of New York*, 169 N.E. 280, 280 (N.Y. 1929). As a result, after discharge, former jurors lack the power to alter the verdict that they previously rendered, even if they may now disagree with it.

2. Together with possessing temporarily expanded authority compared to other citizens, jurors have temporarily curtailed rights. During their service, jurors give up some of the usual freedoms enjoyed in ordinary life. Jurors must report to the courthouse for service at the times and dates required by the judge for the duration of their service. Jurors are subject to a variety of instructions from the judge—to avoid press coverage of the case, not to undertake their own investigation into the facts, not to reach conclusions until all the evidence has been presented, and to avoid discussing the case with others and even with each other until they are authorized to begin their deliberations. Jurors may be sequestered to enforce these restrictions or be held in contempt for failing to comply with them. See, *e.g.*, *United States*

v. *Lawson*, 677 F.3d 629, 641 n.16 (4th Cir. 2012); *United States* v. *Bukowski*, 435 F.2d 1094, 1098 (7th Cir. 1970). And members of the public attempting to influence jurors may be subject to criminal liability. See 18 U.S.C. 1503, 1504.

After discharge, however, jurors "return to society to resume their normal lives unfettered by restriction or limitation imposed by the court," *Mohan* v. *Exxon Corp.*, 704 A.2d 1348, 1352 (N.J. Super. Ct. App. Div. 1998), and, as ordinary citizens, are "free to go about their normal affairs," Juror Handbook 14. Specifically, former jurors are freed from the judge's instructions about where they must be, what they can read, with whom they can speak, and how they must think about the case. For example, after discharge, former jurors may read press coverage about the case and discuss the case with others. See *In re Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982). That is because any "interest * * * in shielding jurors from pressure [that occurs] during the course of the trial * * * becomes attenuated after the jury brings in its verdict and is discharged." *Capital Cities Media, Inc.* v. *Toole*, 463 U.S. 1303, 1306 (1983) (Brennan, J., Circuit Justice); *United States* v. *Antar*, 38 F.3d 1348, 1363 (3d Cir. 1994); *Journal Publishing Co.* v. *Mechem*, 801 F.2d 1233, 1236-1237 (10th Cir. 1986); *United States* v. *Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978).[3]

In addition, after discharge, former jurors are no longer under the judge's authority, except to the same

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[3] To the extent that courts restrict access to former jurors after discharge, it is for their own protection; former jurors retain the ability to waive the restriction. See, *e.g.*, *United States* v. *Brown*, 250 F.3d 907, 921 (5th Cir. 2001). Courts have rejected even those restrictions, moreover, when "there is not a sufficient record of * * * juror harassment." *Antar*, 38 F.3d at 1363.

extent as other ordinary citizens. For example, a district court may punish "[a]ny person," including a former juror, for criminal contempt based on misconduct that occurred during the trial (and may hale a former juror back into court on that basis). Fed. R. Crim. P 42; see *Clark* v. *United States*, 289 U.S. 1, 6 (1933).

Similarly, when a question arises after discharge concerning the jury's verdict, the court may subpoena former jurors as witnesses, just as the court could any person with information relevant to a case. See Fed. R. Civ. P 45; cf. *United States* v. *Stauffer*, 922 F.2d 508, 511 (9th Cir. 1990) (accepting affidavits from former jurors concerning a clerical error in the verdict form). And former jurors, like other ordinary citizens, can testify about historical facts within their knowledge, including certain facts about what they did and observed before discharge. Thus, under the rules of evidence, former jurors may testify about whether "a mistake was made in entering the verdict on the verdict form"; whether "extraneous prejudicial information was improperly brought to the jury's attention"; or whether "an outside influence was improperly brought to bear on any juror." Fed. R. Evid. 606(b)(2).[4] But former jurors may not testify about whether the jury was operating under a misunderstanding about the consequences of their verdict; whether the jury's verdict would have been different under a correct understanding of the instructions or evidence; or whether the former jurors have changed their minds since discharge. See Fed. R. Evid. 606(b)(1); Fed. R. Evid. 606 advisory committee's note (2006); *United States* v. *Stov-*

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[4] The federal rules of procedure provide discrete procedural mechanisms for correcting clerical errors in recording jury verdicts. See Fed. R. Civ. P. 60(a); Fed. R. Crim. P. 36.

er, 329 F.3d 859, 865 (D.C. Cir. 2003) (per curiam); *United States* v. *Jones*, 132 F.3d 232, 246 (5th Cir. 1998), *aff'd*, 527 U.S. 373 (1999); *United States* v. *Schroeder*, 433 F.2d 846, 851 (8th Cir. 1970).

Although a court may exercise power over former jurors after discharge just as it may over other ordinary citizens, what a court cannot do is reconstitute the former jurors *as a jury*—here, for the purpose of further instructing them and ordering them to deliberate anew in order to reach a different verdict. That is because, after discharge, the court no longer has authority over the jury, and the jury no longer has authority over the case. A hypothetical amply proves the point. Suppose that the former jurors here simply refused the request by court personnel to return to the courtroom for further proceedings after their discharge. Would they not have been well within their rights to do so? After all, the court had relinquished its power over the jury as a court instrument, and court personnel had no subpoena, arrest warrant, or notice of contempt to compel the former jurors' return. The fundamental principle that discharge marks a juror's return to being an ordinary citizen underscores the oddity of permitting recall for further service in the same case.

C. A Federal Court Lacks Inherent Authority To Recall Discharged Jurors

This Court has recognized that federal courts have "certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen* v. *United States*, 517 U.S. 820, 823 (1996). But such inherent authority "must be delimited with care" because of the "danger of overreaching when one branch of the Government * * * undertakes to define its own authority." *Ibid.* Members

of the Court have emphasized that "[i]nherent powers are the exception, not the rule, and their assertion requires special justification in each case." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 64 (1991) (Kennedy, J., dissenting).

This Court has followed a three-step analysis for determining whether a federal court has a claimed inherent power. *First*, the Court considers whether the claimed inherent power would "circumvent or conflict with" any relevant statutes or rules. *Carlisle*, 517 U.S. at 426; see *Bank of Nova Scotia*, 487 U.S. at 254-255. *Second*, if the claimed inherent power would not fail that test, the Court considers whether there is evidence that the exercise of that power has a "long unquestioned" history. *Carlisle*, 517 U.S. at 426 (quoting *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 631 (1962)). *Third*, if the claimed inherent power has such a history, the Court considers whether the power is "necessary to the exercise" of a federal court's other powers, *Chambers*, 501 U.S. at 43 (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)), and whether the power is sufficiently "limited by the necessity giving rise to its exercise," *Degen*, 517 U.S. at 829.

Here, the claimed power to recall discharged jurors fails all three of these requirements. Because a federal court lacks inherent as well as express authority to recall discharged jurors, the judgment of the court of appeals should be reversed.

1. As discussed above, recalling discharged jurors for further service in a case would "circumvent or conflict with" a variety of civil and criminal rules constricting a federal court's authority upon discharge. See pp. 14-18, *supra*. Most notably in this case, permitting recall for the purpose of further instructing the jurors and ordering them to deliberate anew would conflict with Civil

Rule 51(b)(3), which limits instruction of the jury to "any time *before* the jury is discharged" (emphasis added). Civil Rule 51(b)(3) does not authorize a district court to instruct a jury after discharge. That should be the beginning and end of this case: a district court has no authority, inherent or otherwise, to contravene such an explicit limitation on the timing of an authorized action.

This Court's decision in *Carlisle*, *supra*, is instructive. That case involved Criminal Rule 29(c), which establishes a time period (today, 14 days from discharge) during which a defendant may move for a judgment of acquittal. See 517 U.S. at 420-421. The Court held that the time limit in that rule deprived the district court of the power to grant a motion for acquittal filed just one day late, even though the district court could have extended the filing period before it expired and even though the district court had found that not granting the motion would have resulted in a "grave injustice." *Id.* at 419, 433 (internal quotation marks omitted). Writing for the Court, Justice Scalia explained that the district court's action in granting the motion "contradicted the plain language of Rule 29(c)[] and effectively annulled the [time] limit." *Id.* at 426.

Just as a federal court may not permit the filing of a motion for acquittal outside the specified time period, so too a federal court may not instruct the jury outside the specified time period, either. A federal court has no discretion to disregard an on-point rule and to substitute its own balancing of competing policy concerns for that embodied in the rule. As this Court has explained, "[e]ven a sensible and efficient use of the supervisory power * * * is invalid if it conflicts with constitutional or statutory provisions," including the federal rules of procedure. *Bank of Nova Scotia*, 487 U.S. at 254 (internal quotation marks and citation omitted). Yet that is pre-

cisely what the court of appeals did in adopting its rule permitting recall for further service in the same case. Cf. Pet. App. 11a (adopting rule because it "strikes a sensible balance between considerations of fairness and economy").

2. In addition, there is no "long unquestioned" history of courts recalling discharged jurors for further service in a case. To the contrary, the evidence indicates that courts historically did not exercise such authority. While some courts have more recently allowed recall (in the decisions giving rise to the conflict at issue here), even those modern decisions fall far short of establishing the "wide usage" required for recognition of an inherent power. *Link*, 370 U.S. at 631.

a. Even before the Founding, the recall of discharged jurors was not permitted at common law. That principle can be traced at least to a decision from the Court of Exchequer during the reign of James I, which concluded that, "when a jury returned by force of any *venire facias* to try an issue, has given a verdict which is accepted and recorded by the Court; be it perfect or imperfect, the jurors are discharged thereof for ever, and shall never be called back in the same cause to try the same issue." *Loveday's Case*, 8 Coke Rep. 65b, 65b, 77 Eng. Rep. 573 (1608). If the verdict were "so imperfect that judgment cannot be given upon it, then the Court shall award a *venire facias de novo*, to try the said issue by others." *Id.* at 65b-66a. Citing that decision and others, a leading treatise on English law stated the principle as follows: "A jury once discharged after giving a verdict upon which judgment has been entered cannot be recalled to rectify the same, but there must be a new trial if the court considers that injustice has been done." 18 Lord Halsbury, *Laws of England* § 632, at 258 (1911).

After the Founding, American courts continued to adhere to the principle that recall of discharged jurors was not permitted. For example, in *Mills* v. *Commonwealth*, 34 Va. 751 (1836), the General Court of Virginia awarded the defendant a new trial after holding that the verdict of a recalled jury must be set aside. See *id.* at 752. After the clerk read the jury's verdict finding the defendant guilty of grand larceny, the trial court had erroneously discharged the jury before it could determine a term of imprisonment. See *id.* at 751. The jurors "were called back instantly"; much like here, most of the jurors were still in the courthouse, but one had left the courthouse by "perhaps * * * forty or fifty yards," "accidentally accompanied" by a deputy sheriff. *Id.* at 751-752. After the judge reassembled the jury and sent it out to deliberate further, the jury returned a two-year term of imprisonment. See *id.* at 752. The General Court of Virginia held that the verdict must be set aside and the case remanded for a new trial because of the trial court's error in recalling the discharged jurors. See *ibid.*

Similarly, in *Sargent* v. *State*, 11 Ohio 472 (1842), the Ohio Supreme Court held that "in no case can [the court] be permitted to recall a jury to alter or amend their verdict after it has been received and the jury discharged." *Id.* at 474. The trial court had recalled discharged jurors after the jury failed to render a verdict on one of the two counts. See *id.* at 472. The Ohio Supreme Court explained that permitting recall "would jeopardize the jealous guards with which the law has surrounded jurors, to insure the pure administration of justice, and to protect the citizen." *Id.* at 474; see *Brister* v. *State*, 26 Ala. 107, 132 (1855); *Snell* v. *Bangor Steam Navigation Co.*, 30 Me. 337, 339 (1849).

b. Other rules and practices at common law confirm there is no "long unquestioned" history of courts recalling discharged jurors for further service in a case.

i. Under English common law at the time of the Founding, a jury was typically not permitted to amend a verdict after the verdict was recorded or after the jury was discharged. See 2 Edward Coke, *The First Part of the Institutes of the Laws of England* § 366, at 227b (16th ed. 1809) (Coke); Francis Wharton, *Criminal Pleading and Practice* § 751, at 492-493 (8th ed. 1880); John Frederick Archbold, *Pleading and Evidence in Criminal Cases* 152 (15th ed. 1862). In *Jackson* v. *Williamson*, 2 Term Rep. 281, 100 Eng. Rep. 153 (1788), the King's Bench refused to amend a jury's verdict when the jurors subsequently stated that they had intended to award a larger sum to the plaintiff. See *id.* at 282. Even in a case in which an English court did permit the correction of a "clear mistake" in reporting the verdict by means of juror affidavits, the court did not suggest that the jury could be reassembled to continue deliberations or to amend a correctly reported verdict. *Cogan* v. *Ebden*, 2 Keny. 24, 25, 96 Eng. Rep. 1094 (K.B. 1757).

After the Founding, American courts maintained the general rule forbidding the amendment of verdicts. In *Little* v. *Larrabee*, 2 Greenl. 37 (Me. 1822), the jurors indicated by affidavit that the verdict written and signed by the foreman was mistaken. See *id.* at 38. The Maine Supreme Judicial Court held that, if a verdict was defective in a matter of form (for example, because of a "clerical mistake[]"), a court could correct it. *Ibid.* But if the jury erred in matter of substance—"either by returning a verdict against the wrong party" or "for a larger or smaller sum than they intended"—a court could not amend the verdict but could only set aside the verdict

and order a new trial. *Id.* at 39-40; see *Walters* v. *Junkins*, 16 Serg. & Rawle 414, 415-416 (Pa. 1827).

ii. At common law, a jury was kept together in seclusion for the duration of deliberations. See 3 Francis Wharton & James M. Kerr, *A Treatise on Criminal Procedure* § 1668, at 2094-2098 (10th ed. 1918) (Wharton & Kerr); 3 William Blackstone, *Commentaries on the Laws of England* 375-376 (1768) (Blackstone); *Commonwealth* v. *M'Caul*, 3 Va. (1 Va. Cas.) 271, 305-306 (Va. Gen. Ct. 1812) (granting new trial where strict segregation was not maintained even though "there might be and probably was no tampering with any juryman in this case"). In fact, the principle of jury segregation was so sacrosanct that, if the jury had not reached a verdict by the time the judge was scheduled to leave town, the judge had the authority to carry the jurors around the circuit with him in a cart until their deliberations were complete. See 3 Blackstone 376. Although the practice of jury sequestration has been relaxed, the basic principle that a jury must be protected from even the possibility of outside influence for the duration of deliberations survives today through the court's instructions to the jury, which expire upon discharge.

iii. Under English common law at the time of the Founding, if a jury failed to reach a unanimous verdict, the court could not recall the original jurors but instead was required to order a new trial before a new jury. A decision from shortly after the Founding, *Rex* v. *Wooler*, 6 M. & S. 366, 105 Eng. Rep. 1280 (K.B. 1817), is instructive. In that case, the King's Bench ordered a new trial because the evidence indicated that not all of the jurors had been able to hear and assent to the verdict as read. See *id.* at 368-369. The judges rejected the argument that the jurors could be re-empaneled to issue a verdict

and instead held that the only option was a new trial. See *id.* at 375-376, 377.

In so concluding, one judge stressed the appearance of impropriety that would result from recalling the jurors: "In no instance that I am aware of can it arise that the same jury should be suffered to re-assemble to consider the same question after they have been mixed with the multitude. If the [c]ourt were to suffer that to be done, what animadversions might well be made upon it by the enlightened part of society!" *Wooler*, 6 M. & S. at 375 (Lord Ellenborough, C.J.). Another judge emphasized that it was "out of [the trial court's] power" to recall the jurors, noting that "the [c]ourt has no process by which it can order the same twelve persons to be assembled again to rehear the case[] and reconsider their verdict." *Id.* at 377 (Abbott, J.).

iv. Finally with regard to the historical practice, the point of discharge was talismanic at common law and affected the operation of a variety of other rules and practices. For example, in civil cases, if the plaintiff did not appear in court to receive the verdict, the jury was discharged and "the action [was] at an end." 3 Blackstone 376. In addition, in civil and criminal cases alike, it was a crime to submit to a juror any information about the case except with the sanction of the court and in the presence of both parties, and it was also a crime for a juror knowingly to participate in such communication. See Wharton & Kerr § 1656, at 2087. Those rules and practices, along with many others, reflect an overarching understanding that discharge constituted the end of a jury's service in a case; they certainly do not support a "long unquestioned" history of juries continuing to provide service in cases after discharge.

c. As explained at greater length in the petition for certiorari (at 8-15), even in the modern era, the clear ma-

jority of courts to have considered the issue have rejected a rule permitting jury recall, confirming that there is no "long unquestioned" history of courts recalling discharged jurors. See *Summers* v. *United States*, 11 F.2d 583, 586 (4th Cir.), cert. denied, 271 U.S. 681 (1926); *Wagner* v. *Jones*, 758 F.3d 1030, 1035-1036 (8th Cir. 2014), cert. denied, 135 S. Ct. 1529 (2015); *T.D.M.* v. *State*, 117 So. 3d 933, 938-940 (Ala. 2011); *Spears* v. *Mills*, 69 S.W.3d 407, 410-414 (Ark. 2002); *People* v. *Hendricks*, 737 P.2d 1350, 1358-1360 (Cal. 1987); *Montanez* v. *People*, 966 P.2d 1035, 1036-1037 (Colo. 1998); *Lahaina Fashions, Inc.* v. *Bank of Hawaii*, 319 P.3d 356, 367-368 (Haw.), cert. denied, 134 S. Ct. 2826 (2014); *West* v. *State*, 92 N.E.2d 852, 855 (Ind. 1950); *State* v. *Fornea*, 140 So. 2d 381, 383 (La. 1962); *Nails* v. *S&R, Inc.*, 639 A.2d 660, 665-667 (Md. 1994); *Pumphrey* v. *Empire Lath & Plaster*, 135 P.3d 797, 802-805 (Mont. 2006); *Sargent* v. *State*, 11 Ohio 472, 473-474 (1842); *Harrell* v. *State*, 278 P 404, 406 (Okla. Crim. App. 1929); *Commonwealth* v. *Johnson*, 59 A.2d 128, 130 (Pa. 1948); *Newport Fisherman's Supply Co.* v. *Derecktor*, 569 A.2d 1051, 1052-1053 (R.I. 1990); *State* v. *Myers*, 459 S.E.2d 304, 305 (S.C. 1995); *State* v. *Nash*, 294 S.W.3d 541, 550-553 (Tenn. 2009); *Webber* v. *State*, 652 S.W.2d 781, 782 (Tex. Crim. App. 1983); *Melton* v. *Commonwealth*, 111 S.E. 291, 293-294 (Va. 1922); *Yonker* v. *Grimm*, 133 S.E. 695, 697-698 (W Va. 1926).[5] Those decisions are sufficient to refute any argument that the authority to recall

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[5] For purposes of considering whether the exercise of a claimed inherent power has a "long unquestioned" history, this Court has consulted both federal and state decisions. See *Link*, 370 U.S. at 631.

discharged jurors is a power of sufficiently "wide usage" to be part of a federal court's inherent authority.[6]

3. Even if no rule forbade the exercise of the claimed power to recall discharged jurors and there were sufficient historical support for its existence, the claimed power would still fail the third requirement for an inherent power: namely, whether the power is "necessary to the exercise" of a federal court's other powers and is sufficiently "limited by the necessity giving rise to its exercise."

This Court has recognized a limited range of powers that satisfy the requirement of necessity, such as the powers of a court to control its docket, see *Clinton* v. *Jones*, 520 U.S. 681, 706 (1997); to appoint a special master, see *In re Peterson*, 253 U.S. 300, 312 (1920); and to sanction a litigant for bad-faith conduct, see *Chambers*, 501 U.S. at 42-46. Notably, each of those powers is addressed to the essential functioning of the court and the enforcement of its decrees.

The claimed power to recall discharged jurors serves no such purpose. Without the power to recall discharged jurors, a court would still be able to exercise its core powers of adjudicating cases, correcting errors, entering final judgments, and enforcing awards. That is because, even absent the power to recall discharged jurors, exist-

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[6] The vast majority of courts to have held that recall after discharge is not permitted have taken a functional view of "discharge," drawing the line at the point at which the discharged jurors leave the judge's presence and control. See Pet. 9-11, 14-15. A minority of courts have taken a more formal view, drawing the line at the point at which the judge announces the jury's discharge. See Pet. 14-15. The Court need not resolve any open question concerning the precise definition of "discharge" in this case, because it is undisputed that the jurors here were discharged under any conceivable understanding of the term. See Br. in Opp. 3-4.

ing rules already provide ample procedures for remedying an invalid or ambiguous verdict after the jury has been discharged: most notably, a new trial. See Fed. R. Civ. P 59; Fed. R. Crim. P 33. As one member of this Court has succinctly put it, "at the very least a court need not exercise inherent power if Congress has provided a mechanism to achieve the same end." *Chambers*, 501 U.S. at 64 (Kennedy, J., dissenting). There can be no serious dispute that the mechanisms for addressing problems with invalid and ambiguous verdicts are sufficient.

The court of appeals in this case seemingly concluded that the power to recall discharged jurors was justified by considerations of expediency: specifically, because recalling discharged jurors provided "a cost-effective alternative to an expensive new trial." Pet. App. 11a. But petitioner is unaware of any case in which this Court has held that considerations of expediency are sufficient to give rise to inherent authority. Cf. *Degen*, 517 U.S. at 827 (citing the "existence * * * of alternative means" of addressing the underlying problem in refusing to recognize a claimed inherent power); *Carlisle*, 517 U.S. at 436 (Ginsburg, J., concurring) (citing the availability of appeals and postconviction proceedings in refusing to recognize an inherent power to consider an untimely motion to acquit). Were it otherwise, inherent authority would quickly cease to be a narrowly confined "exception" to the rule that the authority of a federal court must be conferred by some source of positive federal law. See *Chambers*, 501 U.S. at 64 (Kennedy, J., dissenting).

In short, because none of the requirements for inherent authority is satisfied here, there is no authority for a federal court to recall discharged jurors for further ser

vice in a case. The judgment below should therefore be reversed.

II. A BRIGHT-LINE RULE AGAINST RECALLING DISCHARGED JURORS FOR FURTHER INSTRUCTION AND DELIBERATION IS APPROPRIATE TO PROMOTE THE INTERESTS IN FAIRNESS AND FINALITY

Rather than considering the question in terms of whether a federal court has the authority to recall discharged jurors, the court of appeals engaged in legislative-style policy balancing, concluding that a rule permitting recall "strikes a sensible balance between considerations of fairness and economy." Pet. App. 11a. For the reasons stated above, that was the wrong mode of analysis; the court of appeals should have held that a federal court lacks the authority to recall discharged jurors, and stopped there.

Should this Court determine that the court of appeals correctly engaged in balancing, however, it should conclude that the court of appeals got the balance wrong—at least where, as here, the district court recalled discharged jurors for the purpose of re-empaneling them, further instructing them, and ordering them to deliberate anew in order to reach a different verdict. Such cases pose a particular threat to the fairness and finality interests implicated by jury recall more generally. In the event this Court were to conclude that there is a valid basis for a federal court's exercise of authority to recall discharged jurors, therefore, it should at a minimum establish a bright-line rule, as a matter of "sound judicial practice," that recall is not permitted in these circumstances. *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 265 (2004) (citation omitted).

A. A Bright-Line Rule Promotes The Interest In Fairness

1. To begin with, the recall of discharged jurors raises profound concerns about the basic fairness of jury trials in both civil and criminal cases.

Upon discharge, jurors are no longer bound by their oath or by the judge's instructions and may be exposed to outside influence—whether in the form of opinions about the case or additional evidence. At the point of discharge, "jurors are quite properly free to discuss the case with whomever they choose," and even passing interactions can affect them. *United States* v. *Marinari*, 32 F.3d 1209, 1214 (7th Cir. 1994). Nor are those interactions limited to mere strangers: parties that were actually involved in the case, including litigants, attorneys, witnesses, court personnel, and members of the press, may speak to (or attempt to speak to) jurors after discharge. Discharged jurors are also free to read press coverage about the case or to investigate facts not in the trial record. And of course, in order to do any of these things, all jurors need do upon discharge is to whip out their smartphones—allowing them to make phone calls, surf the Internet, access social media, and send and receive messages. "In this age of instant individualized electronic communication and widespread personal control and management of pocket-sized wireless devices," it is no exaggeration to say that most modern-day jurors connect with sources of potential taint almost immediately upon discharge. *Wagner*, 758 F.3d at 1035; cf. Pet. App. 31a (asking only whether the jurors "*talked* to anybody about the case outside [their] immediate numbers" (emphasis added)).

Even if they are not subject to outside influence, moreover, jurors may simply change their minds after delivering the verdict and being discharged from service

in the case. See *Wagner*, 758 F.3d at 1036. Delivering a verdict, and observing the reactions to it, are themselves psychologically significant events, and the finality of the verdict itself (or a sense of failure at not reaching a verdict) can have a meaningful effect on the thinking of discharged jurors. See, *e.g.*, *Gugliotta* v. *Morano*, 829 N.E.2d 757, 764 (Ohio Ct. App. 2005). Merely having additional time to reflect—during which the jurors are no longer in service and no longer under instructions from the judge regarding proper and improper considerations—may induce changes of heart, bring to mind forgotten evidence, or convince jurors that they capitulated to the majority too quickly.

In addition, recall itself presents "serious potential for confusion, unintended compulsion and, indeed, coercion" of discharged jurors. *Wagner*, 758 F.3d at 1036. Giving "a vacillating juror an opportunity to reconsider" after discharge is fraught with peril, "especially where there is the possibility that the jury, or some of its members, may have been confused in the understanding of the instructions." *Ibid.* That is particularly true where, as here, recall is necessary for the purpose of providing further instruction that was not provided before the jury's discharge (as the relevant federal rules of procedure require).

As a consequence, the recall of discharged jurors implicates the fundamental guarantee of "a fair trial in a fair tribunal," as embodied in the specific constitutional rights to a jury trial as well as the broader right to due process. *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (internal quotation marks and citation omitted); see *Nash*, 294 S.W.3d at 553; *Hendricks*, 737 P.2d at 1358. Recall also has implications for preserving the perception of fairness in the judicial system, because it is a "paramount consideration" that a jury must be

"free from even the appearance of taint or outside influences." *Spears*, 69 S.W.3d at 413.

2. A bright-line rule forbidding the recall of discharged jurors for further instruction and deliberation protects the fundamental right to a fair trial as well as "the need to maintain confidence in the sanctity of jury verdicts." *Pumphrey*, 135 P.3d at 804. Where, as here, a court seeks to recall discharged jurors for the purpose of re-empaneling them, further instructing them, and ordering them to deliberate anew in order to reach a different verdict, the dangers set out above are at their most acute, and the actuality or appearance of fairness is necessarily compromised. The very fact that the jurors have ceased to be a properly constituted jury renders invalid a subsequent verdict resulting from further deliberation.

In that sense, this case is no different from cases involving decisions by other types of improperly constituted tribunals—whether indictments issued by improperly constituted grand juries, verdicts rendered by improperly constituted petit juries, or judgments entered by improperly constituted appellate panels. In all of those situations, the resulting decision is void without regard to whether there was undue prejudice from the improper constitution of the tribunal. See *Nguyen* v. *United States*, 539 U.S. 69, 81-82 (2003); *Vasquez* v. *Hillery*, 474 U.S. 254, 264 (1986); *Davis* v. *Georgia*, 429 U.S. 122, 122 (1976) (per curiam); *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 690 (1960).

So too here, a different verdict issued by discharged and re-empaneled jurors is invalid because they are no longer a properly constituted tribunal. Neither the jurors' eligibility to render the initial verdict in this case nor the absence of undue prejudice during their dis-

charge is sufficient to ensure the actuality and appearance of fairness.

3. Under the rule adopted by the court of appeals in this case, a court would have to engage in a case-by-case determination of whether the discharged jurors encountered prejudicial influences of such magnitude as to prevent them from fairly reconsidering their verdict. See Pet. App. 12a. As a preliminary matter, there can be little dispute that a bright-line rule forbidding recall in these circumstances would "offer[] better guidance [to lower courts] than an amorphous rule" such as that adopted by the court of appeals. *Wagner*, 758 F.3d at 1035.

But more broadly, the court of appeals' rule overlooks the fundamental shift that occurs when jurors are discharged. There is "a marked difference between an admonished jury" that leaves the judge's supervision with a case still under consideration and one that leaves the judge's supervision "under the impression that the case is over and their duties complete." *Wagner*, 758 F.3d at 1035 n.9. While jurors remain empaneled, they "are presumed to follow the court's instructions" and thus to avoid outside influences. *CSX Transportation, Inc.* v. *Hensley*, 556 U.S. 838, 841 (2009) (per curiam). In that situation, judicial inquiry can be effective in identifying and addressing any episode of potential taint.

After jurors are discharged, however, they return to being ordinary citizens and are free to do and think as they please. At that point, their function as jurors has come to an end, and the oath and instructions that limit their conduct are lifted. Episodes of potential taint are no longer isolated nor simple to identify—after all, they are perfectly legitimate at the time they occur—and they affect every discharged juror. And the effects of discharge and recall may not be apparent even to the ju-

rors-turned-citizens-turned-jurors themselves. There is little reason to believe that an inquiry into prejudice after discharge would be adequate to address the problem. Because the recall of discharged jurors for further instruction and deliberation compromises the actuality or appearance of fairness, it is appropriate to prohibit recall in those circumstances.

B. A Bright-Line Rule Promotes The Interest In Finality

The recall of discharged jurors for further instruction and deliberation also undermines the finality of jury verdicts, to the detriment of litigants, jurors, and the judicial system. A bright-line rule prohibiting recall in such circumstances promotes the interest in finality.

Recall interferes with finality for obvious reasons. Under the court of appeals' approach (or any other approach that authorizes courts to recall discharged jurors for further instruction and deliberation), a jury's verdict could remain subject to challenge, and change, indefinitely. As long as a judge determines that jurors can return to the case without undue prejudice—whether it be minutes, hours, days, weeks, or months later—the judge could reopen the verdict, whether *sua sponte* or on a motion from a disappointed litigant. The court of appeals' approach would replace the adage "it ain't over till it's over" with the adage "it ain't ever over."

Take this case as an example. The judge recalled the discharged jurors because he recognized that the verdict was contrary to the evidence and the law, making "a new trial * * * mandatory." Pet. App. 28a; see *id.* at 26a. Here, the judge recognized the problem with the verdict on the same day that the jury rendered it. But suppose the judge had failed to do so. Civil Rule 59 gives the losing party 28 days in which to seek a new trial. See Fed.

R. Civ. P. 59(b).[7] Under a rule authorizing recall to permit the original jury to reach a different verdict from its initial, invalid verdict, it is conceivable that the judge, upon receiving petitioner's promised motion for a new trial, could have responded to the motion by reconstituting the original jury, rather than constituting a new one. Indeed, it is conceivable that a party could itself file a motion to recall the jury at some unspecified point after the initial verdict, regardless of the constraints on other types of post-trial motions.

That way madness lies. Under the court of appeals' approach, jurors—after being told that their service has ended—could be haled back into court indefinitely for a potentially extended period of further service in the case. But jury service is not a life sentence, and nothing in the rules or any other source of positive federal law suggests otherwise. Instead, the rules support the conclusion that a jury's functions, including its power to alter its verdict, are over when the jury has been discharged. A bright-line rule thus promotes not only fairness, but also finality.

C. Any Interest In Expediency Does Not Outweigh The Interests In Fairness And Finality

As noted above, the court of appeals' primary justification for allowing a judge to recall discharged jurors for further instruction and deliberation was that recall provided "a cost-effective alternative to an expensive new trial." Pet. App. 11a. Mere expediency, however, does not outweigh the significant fairness and finality interests at stake. As a preliminary matter, it is far from clear that recall would always be a more efficient alter-

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[7] In some circumstances, Criminal Rule 33 gives a defendant up to *three years* to move for a new trial. See Fed. R. Crim. P. 33(b)(1).

native than other procedures for remedying an invalid or ambiguous verdict.

But even if it were, the judicial system does not pursue expediency at all costs. As discussed above, the federal rules of procedure specify certain remedies for errors that occur at trial before discharge. While jurors remain empaneled in a case, they may be reinstructed, may return to their deliberations, and may even reach a different verdict. See Fed. R. Civ. P. 48(c), 51(b)(3); Fed. R. Crim. P. 30(c), 31(d). Those rules create incentives for parties to identify and correct certain types of errors while the jury remains empaneled. For example, "[i]t is well established that a party waives its objection to any inconsistency in a jury verdict if it fails to object to the verdict prior to the excusing of the jury," so as to ensure that the court has "the option of re-submitting the questions to the jury after some further instruction." *Kosmynka* v. *Polaris Industries, Inc.*, 462 F.3d 74, 83-84 (2d Cir. 2006) (citing cases); see Fed. R. Civ. P. 49.

As to other types of errors, however, parties are under no such obligation, and the federal rules of procedure provide other remedies. Of particular relevance here, Civil Rule 59 gives the losing party 28 days after the entry of judgment to object to a jury's verdict on the ground that it was contrary to the weight of the evidence. See Fed. R. Civ. P. 59; *Montgomery Ward*, 311 U.S. at 251. That is why petitioner was under no obligation to bring the jury's error to the court's attention before discharge (if anything, it was respondent who should have had every incentive to do so).[8] The rules and obligations of the federal system are structured in such a

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[8] Immediately after discharge, petitioner's counsel did indicate his intention to file a post-trial motion. See Pet. App. 25a.

way as to afford the losing party the right to obtain a new trial, even if it would be more efficient in some circumstances to permit the original jury to correct its initial error.

In sum, a rule permitting recall of discharged jurors for further instruction and deliberation would not only flout considerations of fairness and finality; it would fly in the face of the balance already struck by the federal rules of procedure. Because a federal court has neither express nor inherent authority to recall discharged jurors for further service in a case, the judgment of the court of appeals cannot stand. That judgment should be reversed, and the case remanded for a new trial.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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